APPENDIX A

COLORADO COURT OF APPEALS **November 9, 1995**
No. 94CA0652
No. 94CA0661

DIANNE R. WINKLER,

Plaintiff-Appellee,

v.

ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH, A COLORADO NON-PROFIT CORPORATION, AND GLENN CHAMBERS,

Defendants-Appellants.

Appeal from the District Court
of the City and County of Denver
Honorable John N. McMullen, Judge
No. 93CV378

Division V **JUDGMENT AFFIRMED IN PART**
Opinion by JUDGE ROY **AND REVERSED IN PART**
Ruland and Rothenberg, JJ., concur

Holland, Seelen & Pagliuca, Brian K. Holland, Joyce A. Seelen, Denver, Colorado, for Plaintiff-Appellee

Quigley & Bruce, Neil Quigley, Bruce A. Logan, Denver, Colorado, for Defendant-Appellant Rocky Mountain Conference of the United Methodist Church

Keller, Wahlberg & Morrato, P.C., James J. Morrato, Denver, Colorado, for Defendant-Appellant Glenn Chambers

In this consolidated appeal, defendants, Glenn Chambers and Rocky Mountain Conference of the United Methodist Church (Conference), appeal from the judgment entered on jury verdicts in favor of plaintiff, Dianne R. Winkler, based on claims that Chambers and the Conference breached their fiduciary duty to Winkler, that the Conference negligently hired or supervised Chambers, and that Chambers engaged in extreme and outrageous conduct. The Conference also appeals the trial court's awards of costs to Winkler. We affirm in part and reverse in part.

Chambers served as senior pastor to Grace United Methodist Church by appointment from the Conference from 1979 until he was suspended in April 1992 because of allegations of misconduct. Throughout his employment, Chambers had an alcohol problem dating to 1972 of which the Conference was aware.

In 1980, the Conference was informed of an incident concerning Chambers attributable to the abuse of alcohol. In 1986, a woman associate pastor of Grace Church told a District Superintendent for the Conference that Chambers had inappropriately touched her, but requested no further action as she "would take care of it." In October 1991, a parishioner reported to a Conference pastor alleging inappropriate conduct by Chambers, but did not file a formal complaint. At trial, this parishioner testified that she told the Conference that she did not like the way Chambers spoke to her and the fact that "he always seemed to be around" her when she was at church.

Winkler joined Grace Church in 1988 and thereafter began to volunteer her services for a variety of activities including the remodeling of a classroom. Winkler engaged in the volunteer activities, in part, on the recommendation of her therapist to work in a "safe" environment to overcome her fears of the workplace. Winkler's volunteer work caused her to be in contact with Chambers during the off hours. It was this contact with Chambers that led to her lawsuit.

While Winkler testified as to other incidents of improper conduct by Chambers, three incidents set forth the context upon which her claims were based:

(1) Winkler testified that, in August 1990, as she was remodeling a classroom, Chambers approached her, and after some initial conversation he put his arm around her, caressed her back, and told her: "You are really beautiful." He then started stroking her hair and said, "I love you, Dianne; you mean so much to me." After he left, Winkler stated that she felt physically ill, held herself tightly, and cried.

(2) A few days following the first incident, Winkler went to discuss a matter with Chambers in his office. They sat next to each other on a small couch, and he stroked her leg on the inside of her thigh and expressed his love for her. Winkler stated that she tried to ignore his touch and left the room as soon as he answered her question.

(3) In January 1992, Winkler was in a storeroom when Chambers entered the room. He came up to her, put his hand on the left side of her body, and rubbed his body up and down on her right side. He also bumped her and moved his hands up to the side of her breast and told her he "really loved her" and "did she hear what he was saying." Shortly thereafter, when she left the storeroom and told two women she met that she was "sick of" Chambers touching her, one responded, "Oh my God, not you too."

In March 1992, a formal inquiry into Chambers' inappropriate conduct with women began when another woman parishioner filed a formal complaint with church authorities. In partial response to this formal complaint, a Conference pastor held a meeting on April 24, 1992, at her home. This Conference pastor was the same individual who had received the 1991 report. Just prior to the meeting, the Conference suspended Chambers for three months.

Six women, including Winkler, attended the meeting. Winkler testified that the other women described instances of unwanted verbal comments and physical contact. Winkler further stated that all of the women were asked to file written complaints detailing their experiences with Chambers.

Winkler filed suit against Chambers, Grace Church, and the Conference on January 22, 1993, alleging breach of fiduciary duty and outrageous conduct against Chambers; breach of fiduciary duty, negligent hiring or supervision, and outrageous conduct against both Grace Church and the Conference; and vicarious liability by ratification against Grace Church. Winkler also sought punitive damages against all three defendants.

Chambers admitted that he had a long-term problem with alcohol. He stated that he did not remember most of the incidents about which Winkler and the others testified and that it was his general demeanor to be open and affectionate with members of the congregation both verbally and physically. As to those incidents he did remember, he stated that any verbal comments were misunderstood and that the physical contact was incidental.

Prior to trial, Grace Church settled all claims with Winkler for $23,500, and it was dismissed from the proceedings pursuant to stipulation.

After a twelve-day trial, the jury returned special verdicts in favor of Winkler against Chambers on the breach of fiduciary duty claim totaling $28,675, and on the outrageous conduct claim in the amount of $28,675. The jury also returned special verdicts in favor of Winkler and against the Conference on the claim for negligent hiring and supervision totaling $95,853, and on the breach of fiduciary duty claim in the amount of $10,651. The trial court awarded costs of $2,918.58 against the Conference based on an offer of settlement [judgment] made pursuant to § 13-17-202, C.R.S. (1995 Cum. Supp.), and awarded costs of $13,067.96 against both Chambers and the Conference jointly

and severally pursuant to § 13-16-104, C.R.S. (1987 Repl. Vol. 6A).

Initially, we address and reject the Conference's contention that the Establishment Clause of the First Amendment bars Winkler's claims against it.

The Conference contends that the "Book of Discipline," which governs the manner of ordaining ministers, their election to membership in the Conference, the responsibilities of membership in the Conference, and the manner of discipline and removal, embodies religious beliefs that are protected. Thus, it argues, its handling of the Chambers matter and its processing of the complaints against him are protected under the First Amendment. The Conference further argues that the jury's consideration of Chambers' history with the Conference under theories of negligent hiring or supervision infringes upon protected beliefs.

In both *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988) and *Moses v. Diocese of Colorado,* 863 P.2d 310 (Colo. 1993), *cert. denied,* U.S. , 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994), our supreme court held that claims of breach of fiduciary duty, negligent hiring or supervision, and vicarious liability in civil actions against clergy members and their supervisors are viable if they are supported by competent evidence in the record. Notwithstanding the Conference's assertions that those cases were wrongly decided, they are controlling precedent dispositive of the Conference's arguments. *See also DeBose v. Bear Valley Church of Christ,* 890 P.2d 214 (Colo. App. 1994) (*cert. granted* June 19, 1995).

Furthermore, we note that neither Chambers nor the Conference contend that Chambers' method of communicating with parishioners by touching, hugging, and expressing affection was based on any religious tenet or belief. *Cf. DeBose v. Bear Valley Church of Christ, supra.* Therefore, we conclude that the trial court properly rejected the Conference's defense based on the First Amendment.

II.

Next, the Conference and Chambers each contend that there was insufficient evidence of a fiduciary relationship with Winkler to create liability. We disagree.

The existence of a fiduciary relationship is a prerequisite to a finding of a fiduciary duty. A fiduciary relationship may arise when one person occupies a superior position relative to another. *See Moses v. Diocese of Colorado, supra;* Restatement (Second) of Torts §874 (1979).

A fiduciary is a person having a duty, created by his or her undertaking, to act primarily for the benefit of another in matters connected with the undertaking. A fiduciary's obligations include a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with beneficiaries. *Destefano v. Grabrian, supra.*

Fiduciary liability requires not only a repose of trust, but an assumption of a duty and a breach of that duty. Whether a fiduciary relationship exists is a question of fact to be resolved by the jury. *Moses v. Diocese of Colorado, supra.*

Winkler asserts that Chambers entered into a fiduciary relationship with her by counseling her on personal matters. She testified that the counseling sessions frequently took place on an informal basis and that during these sessions they discussed numerous intimate matters involving herself and her family. She further argues that Chambers breached his fiduciary duties to her by his conduct.

Chambers argues that the evidence does not support the proposition that there was any counseling relationship, but rather, at most, that he and Winkler had a normal clergy-parishioner relationship, which is not necessarily fiduciary in nature.

With respect to the Conference, Winkler asserts that a fiduciary relationship was created by the Conference assuming control of the investigation of her complaints and those of

others. Winkler argues that such a fiduciary relationship was created by: (1) the Conference's actions at the April 24, 1992, meeting at which the Conference seemed very concerned about the women and wanted them to stay together and be supportive of each other; (2) the Conference providing a therapist to help the women; and (3) the Conference preparing and sending a letter to the Grace Church congregation stating that:

> We are equally concerned for the healing of any persons who have been hurt. They will continue to receive appropriate help for their healing and restoration.

Based on these actions, Winkler testified that she trusted the Conference and felt that it would take care of and protect her.

Winkler argues that the Conference breached its fiduciary duties to her by: (1) failing to provide adequate counseling to the affected women; (2) undermining the credibility of the women by telling the congregation of Grace Church that there was nothing in Chambers' personnel file that indicated he had problems; (3) failing to protect the women who had brought complaints against Chambers from ensuing verbal attacks that were directed towards the women, who remained unidentified, as a group; and (4) not sending a letter to the congregation stating that it had found the women's complaints credible.

The Conference contends that it was engaged only in the processing of the complaints and that it did not assume a duty to act in Winkler's best interest.

Here, the jury was instructed on the requisite elements of a fiduciary relationship and determined that a fiduciary relationship existed between Winkler and Chambers and Winkler and the Conference, that Chambers and the Conference breached that duty, that Winkler suffered damages as a result, and that Winkler's damages were proximately caused by the respective breaches. That determination will not be reversed if there is a reasonable basis in the record to support it. *See Moses v. Diocese of Colorado, supra.*

Based on our review of the record, though the evidence is conflicting, we conclude that there is sufficient evidence from which the jury could determine that Chambers and the Conference each entered into a fiduciary relationship with Winkler and that Chambers and the Conference breached their fiduciary duties. Therefore, the trial court did not err in instructing the jury on the fiduciary issue claims.

We reject the Conference's contention that it is immune from liability under §13-21-116, C.R.S. (1987 Repl. Vol. 6A). There is no showing here that the Conference was a volunteer organization or that it accomplished its work through unpaid volunteers. *See Jones v. Westernaires, Inc.,* 876 P.2d 50 (Colo. App. 1993).

III.

The Conference also contends that Winkler's action is barred by the applicable statute of limitations. In particular, the Conference asserts the trial court erred by not instructing the jury to determine on what date Winkler's claims of negligent hiring or supervision accrued and that the Conference was not responsible for any alleged negligent supervision that occurred prior to January 22, 1991, two years before Winkler filed this action. We disagree.

A cause of action accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. Section 13-80-108(1), C.R.S. (1995 Cum. Supp.); *Mastro v. Brodie,* 682 P.2d 1162 (Colo. 1984).

The time when a plaintiff discovered, or through the use of reasonable diligence should have discovered, the negligent conduct is normally a question of fact which must be resolved by the trier of fact, in this case a jury. However, if the undisputed facts clearly show that a plaintiff discovered, or reasonably should have discovered, the negligent conduct as of a particular date, the issue may be decided as a matter of law.

The critical inquiry of when an action accrues is knowledge of the facts essential to the cause of action, not knowledge of the legal theory upon which the action may be brought. *Morris v. Geer,* 720 P.2d 994 (Colo. App. 1986).

Here, Winkler did not know, nor could she be expected to discover, the factual basis for her claims of negligent hiring or supervision until January 1992, when the storeroom incident occurred and Winkler first learned that at least one other woman had similar experiences with Chambers and that the church authorities had been so informed. January 1992 was well within the applicable two-year statute of limitations.

Conversely, we note that the Conference had a continuing duty to supervise Chambers and became liable for his actions when it knew or should have known that his conduct would subject a third party to an unreasonable risk of harm. *See Destefano v. Grabrian, supra.*

Therefore, we conclude that the trial court did not err by not submitting the issue of the date of accrual to the jury.

We also reject the Conference's related argument, based on *Cassidy v. Smith,* 817 P.2d 555 (Colo. App. 1991), that if the trial court had determined that each incident created a new claim, the jury should have been instructed that the Conference was not responsible for any alleged negligent supervision occurring prior to January 22, 1991. Because we have concluded that Winkler's claim against the Conference for negligent hiring or supervision accrued within the applicable statute of limitations, such an instruction was not appropriate.

IV.

The Conference next contends the trial court erred in failing to instruct the jury that it could consider whether Winkler assumed the risk of Chambers' tortious conduct. In addition, the Conference and Chambers contend the jury should have been

instructed on the affirmative defense that Winkler failed to mitigate or minimize her damages. Chambers also argues that the jury should have been instructed on comparative negligence principles with regard to Winkler's claims against him. We find no merit in these contentions.

The premise for the Conference's argument that an assumption of the risk instruction was appropriate is that, after the first incident, Winkler knew that when she was alone at church with Chambers he would act improperly towards her. We conclude that this premise is flawed.

A.

An instruction based on assumption of risk may be appropriate with regard to claims for which comparative negligence principles are applicable. *See CJI-Civ. 3d* 9:4 (1988) (Notes on Use) (assumption of risk instruction should be given only in comparative negligence cases governed by statute). Comparative negligence is applicable only if there is evidence that would support a finding that both parties are at fault. *See DeBose v. Bear Valley Church of Christ, supra.*

Even if we assume that comparative negligence principles may apply to a claim for breach of fiduciary duty or negligent supervision or hiring, an issue not addressed by the parties, we conclude that there is no evidence which would support a finding that Winkler was at fault or had knowledge of the danger to which she was exposed, consented to that danger, and assumed the risk. *See Carter v. Lovelace,* 844 P.2d 1288 (Colo. App. 1992). There is no indication that Winkler's continued contact with Chambers, especially in a counseling relationship, established either fault, consent to a known danger, or assumption of the risk.

Further, the record indicates that Winkler was vulnerable because of her mental state and that, unless she completely abstained from going to church, contact with Chambers was inevitable. Thus, under such circumstances, we conclude that an

assumption of the risk instruction was not supported by the record.

The jury was instructed that it could consider Winkler's comparative negligence with respect to her negligent hiring and supervision claim against the Conference. Without addressing the appropriateness of the instruction, we conclude that the issue of assumption of risk was subsumed in the instructions that were given to the jury. *See Howard v. Wood Bros. Homes, Inc.*, 835 P.2d 556 (Colo. App. 1992), *rev'd in part on other grounds*, 862 P.2d 925 (Colo. 1993).

In light of our previous conclusions, we also conclude that the trial court did not err in failing to instruct the jury on comparative negligence with regard to Winkler's claim for breach of fiduciary duty and outrageous conduct against Chambers. Moreover, Chambers, in effect, by arguing that his actions amounted to battery, admitted that his conduct was intentional. See *CJI-Civ. 3d* 20:5 (1989). Accordingly, on that basis, a comparative negligence instruction would not have been appropriate. *See Carman v. Heber*, 43 Colo. App. 5, 601 P.2d 646 (1979) (comparative negligence statute inapplicable to claims based on intentional conduct); *see also* Restatement (Second) of Torts §481 (1965).

B.

The Conference and Chambers also submitted instructions which provided, respectively, that Winkler had a duty to mitigate her damages (1) by reporting Chambers' offensive conduct to church authorities earlier as a reasonable person would have done under similar circumstances and (2) by continuing to have contact with Chambers without requesting that he stop the offensive conduct. In light of our determination that instructions based on assumption of the risk and comparative negligence were not appropriate, the trial court did not err in refusing to submit the tendered instructions on failure to mitigate damages to the jury.

Moreover, the jury was instructed that it could consider whether Winkler failed to mitigate damages by not promptly obtaining appropriate therapeutic or medical care. We conclude that this instruction adequately set forth the extent of Winkler's duty to mitigate or minimize her damages in this case.

V.

Relying on *Rigazio v. Archdiocese of Louisville,* 853 S.W.2d 295 (Ky. App. 1993), Chambers asserts that the trial court erred in instructing the jury on outrageous conduct rather than on the more "traditional" and "well-recognized" tort of battery. In this regard, Chambers argues that the tort of outrageous conduct cannot lie to redress conduct constituting battery. Chambers further asserts that characterizing conduct amounting to battery as outrageous conduct should not extend the statute of limitations. We disagree with both assertions.

A.

Chambers' first argument ignores the history of the tort of outrageous conduct in Colorado. Our supreme court first recognized the tort in *Rugg v. McCarty,* 173 Colo. 170, 177, 476 P.2d 753, 756 (1970), in which it stated that to be actionable, the conduct for which redress is sought must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Outrageous conduct is an independent tort which, if proved, entitles the plaintiff to compensatory damages. *Churchey v. Adolph Coors Co.,* 759 P.2d 1336 (Colo. 1988). The theories of outrageous conduct and battery overlap, and depending on the facts of the case, they may coexist, or either may exist without the other. *See Enright v. Groves,* 39 Colo. App. 39, 560 P.2d 851 (1977) (actions of a police officer in arresting a woman supported separate claims for battery and outrageous conduct). Moreover, we note that our supreme court has recognized the

tort of outrageous conduct as an appropriate cause of action in a suit involving the misconduct of a clergyman. *See Destefano v. Grabrian, supra.*

B.

Since outrageous conduct is a separate tort which may be premised on conduct amounting to a battery, it follows that an action with respect thereto is not barred by the statute of limitations relating to battery.

Actions based on battery are barred one year after both the injury and the cause are known or should have been known by the exercise of reasonable diligence. Sections 13-80-103(1)(a), C.R.S. (1987 Repl. Vol. 6A) and 13-80-108(1). The limitation period applicable to outrageous conduct is two years from the date of accrual. Sections 13-80-102(1)(a), C.R.S. (1995 Cum. Supp.) and 13-80-108(1). The storeroom incident occurred in early January 1992, and Winkler commenced this action on January 22, 1993, presumably more than one year later.

In addition, in those instances in which a claim may be pursued on two theories having different limitations on actions, the longer limitation applies. *Jones v. Cox*, 828 P.2d 218 (Colo. 1992). Thus, the outrageous conduct claim, having been filed within two years of the storeroom incident, was timely.

Hence, the trial court did not err in instructing the jury on Winkler's claim of outrageous conduct, nor was the action barred by the statute of limitations relating to battery.

VI.

Chambers next contends that the trial court erred in admitting testimony from other women who testified that he engaged in similar misconduct with them. We disagree.

Similar transaction evidence, while more commonly proffered in criminal cases, may be utilized in civil cases if it is

relevant to the issues. *See Munson v. Boettcher & Co.,* 832 P.2d 967 (Colo. App. 1991), *aff'd*, 854 P.2d 199 (Colo. 1993). Such evidence may be used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." CRE 404(b). To be admissible, it must satisfy the four-part test set forth in *People v. Spoto,* 795 P.2d 1314 (Colo. 1990). *See also DeBose v. Bear Valley Church of Christ, supra.*

Here, the other women testified that Chambers engaged in inappropriate touching and made unwanted verbal comments to them. Thus, the testimony met the threshold requirement of similarity.

We further conclude that the evidence was admissible under *People v. Spoto, supra.* The evidence related to a material issue of fact, *i.e.,* whether Chambers' conduct towards Winkler was intentional and with improper motive, or accidental. It was logically relevant because the other incidents tended to negate Chambers' argument that the touching was accidental and that his comments were not inappropriate. Thus, the logical relevance of the evidence was independent of the prohibited inference that Chambers had a bad character and acted in conformity with that character. The fact that such an inference may be drawn does not render the evidence inadmissible. Furthermore, we conclude that the trial court did not abuse its discretion in finding that the prejudicial effect of the evidence was outweighed by its probative value. *See People v. SPOTO, supra; DeBose v. Bear Valley Church of Christ, supra.*

VII.

The Conference next contends that the trial court erred in entering judgment for costs against it based on an offer of settlement (offer of judgment) to multiple defendants that did not apportion the settlement amongst the various defendants. We agree.

In *Taylor v. Clark,* 883 P.2d 569, 571 (Colo. App. 1994), a division of this court held that §13-17-202 does not apply to an

unapportioned offer of settlement made by a defendant to more than one plaintiff, reasoning that:

> The effectiveness of the statute is based on the ability of parties accurately to assess the value of their claims at issue and compare that value with a settlement offer. Such a comparison becomes difficult, however, when a defending party makes a lump sum offer to multiple parties with distinct interests.
>
> Further, since an unapportioned offer can only be accepted by all the offerees acting in unison, an individual offeree cannot independently weigh the benefit of accepting an unspecified portion of the offer against the likelihood of receiving a less favorable judgment. Thus, an unapportioned offer to multiple parties takes away the individual offeree's ability to make a meaningful choice between accepting the offer or continuing with the litigation, and application of the statute under these circumstances does not comport with the policy of encouraging the settlement of lawsuits.

Relying on *Anderson v. Dunton Management Co.*, 865 P.2d 887 (Colo. App. 1993), Winkler argues that because the judgment obtained against the Conference individually, including interest and costs, exceeded the settlement offer to all three defendants, the, statute is applicable. However, we conclude that the reasoning set forth in *Taylor v. Clark, supra,* is dispositive.

Therefore, we conclude that the trial court erred in awarding Winkler costs based on the offer of settlement statute and that the judgment should be reduced by $2,918.58, the amount of that award.

VIII.

The Conference next contends that the trial court improperly imposed joint and several liability on it for the costs awarded Winkler. We disagree.

Section 13-16-104 provides that a successful plaintiff shall recover his or her costs incurred in an action against a defendant. This section does not expressly provide for, or preclude, a pro rata assignment of costs amongst litigants.

The Conference contends that the imposition of joint and several liability for costs is contrary to principles of tort reform in general and more specifically to the concept of pro rata liability embodied in the doctrine of comparative negligence set out in §§13-21-111 and 13-21-111.5, C.R.S. (1987 Repl. Vol. 6A). The Conference argues that the trial court should have allocated the amount of costs entered against each defendant on a pro rata basis in the same percentage as the jury verdict against each defendant as to the total jury verdict. Thus, on that basis, the Conference would be liable for approximately 65% of the costs.

In *Cobai v. Young,* 679 P.2d 121 (Colo. App. 1984), a division of this court held that a trial court may allocate costs between defendants. *See also* §§13-16-108 and 13-16-109, C.R.S. (1987 Repl. Vol. 6A). This result is essentially what the Conference advocates here. However, the court in *Cobai* implicitly held that the trial court's right to allocate costs between defendants is discretionary.

Because we conclude that, under the circumstances present here, the trial court did not abuse its discretion in making the award of costs against the defendants joint and several, we will not overturn that award on appeal. *See Poole v. Estate of Collins,* 728 P.2d 741 (Colo. App. 1986)

IX.

Finally, the Conference contends that the trial court erred by failing to advise the jury of the amount of the settlement that Winkler entered into with Grace Church and by failing to offset that amount from the verdict. Under the circumstances here, we disagree.

Here, the Conference chose not to designate Grace Church as a liable non-party because such a designation would have been inconsistent with its defense that neither it nor the church was negligent. In light of that strategic decision, the jury was not permitted to apportion the degree of fault attributable to the settling party. Thus, the trial court did not err in not subtracting the amount of the settlement from the verdict. *See Smith v. Zufelt,* 880 P.2d 1178 (Colo. 1994) (verdict may be reduced only by the cumulative percentage of liability attributable to any settling parties by the jury).

We reject the Conference's argument that the jury should have been instructed in accordance with *Greenemeier v. Spencer,* 719 P.2d 710 (Colo. 1986). That case was decided prior to the present statutory scheme relating to apportionment of damages with designated non-parties and contributions among joint tortfeasors. In any event, the jury was informed that Grace Church had been a party and had settled, but it was not so instructed.

X.

The judgment awarding Winkler $2,918.58 in costs based on an offer of settlement is reversed. The balance of the judgment is affirmed.

JUDGE RULAND and JUDGE ROTHENBERG concur.

COLORADO COURT OF APPEALS **November 9, 1995**
No. 94CA0652
No. 94CA0661

DIANNE R. WINKLER,

Plaintiff-Appellee,

v.

ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH, A COLORADO NON-PROFIT CORPORATION, AND GLENN CHAMBERS,

Defendants-Appellants.

Appeal from the District Court
of the City and County of Denver
Honorable John N. McMullen, Judge
No. 93CV378

Division V **JUDGMENT AFFIRMED IN PART**
Opinion by JUDGE ROY **AND REVERSED IN PART**
Ruland and Rothenberg, JJ., concur

Opinion Modified, and As Modified,
Petitions for Rehearing DENIED

Holland, Seelen & Pagliuca, Brian K. Holland, Joyce A. Seelen, Denver, Colorado, for Plaintiff-Appellee

Quigley & Bruce, Neil Quigley, Bruce A. Logan, Denver, Colorado, for Defendant-Appellant Rocky Mountain Conference of the United Methodist Church

Keller, Wahlberg & Morrato, P.C., James J. Morrato, Denver, Colorado, for Defendant-Appellant Glenn Chambers

OPINION is modified as follows:

Beginning on page 1, 10 lines from the top of the page, the following addition (shown by overshadowing) is made:

> Chambers served as senior pastor to Grace United Methodist Church by appointment from the Conference from 1979 until he was suspended in April 1992 because of allegations of misconduct. Throughout his employment, Chambers had an alcohol problem dating to 1972 of which the Conference was aware well prior to 1992.

In this consolidated appeal, defendants, Glenn Chambers and Rocky Mountain Conference of the United Methodist Church (Conference), appeal from the judgment entered on jury verdicts in favor of plaintiff, Dianne R. Winkler, based on claims that Chambers and the Conference breached their fiduciary duty to Winkler, that the Conference negligently hired or supervised Chambers, and that Chambers engaged in extreme and outrageous conduct. The Conference also appeals the trial court's awards of costs to Winkler. We affirm in part and reverse in part.

Chambers served as senior pastor to Grace United Methodist Church by appointment from the Conference from 1979 until he was suspended in April 1992 because of allegations of misconduct. Throughout his employment, Chambers had an alcohol problem dating to 1972 of which the Conference was aware well prior to 1992.

In 1980, the Conference was informed of an incident concerning Chambers attributable to the abuse of alcohol. In 1986, a woman associate pastor of Grace Church told a District Superintendent for the Conference that Chambers had inappropriately touched her, but requested no further action as she "would take care of it." In October 1991, a parishioner reported to a Conference pastor alleging inappropriate conduct by Chambers, but did not file a formal complaint. At trial, this parishioner testified that she told the Conference that she did not like the way Chambers spoke to her and the fact that "he always seemed to be around" her when she was at church.

COURT OF APPEALS OF THE STATE OF COLORADO

Case Number: 94CA0652 & 94CA0661

Trial Court Number: 93CV378

ORDER

DIANNE R.WINKLER V ROCKY MOUNTAIN CONF., ET AL

Upon consideration of the Petitions for Rehearing filed by the Appellants herein, the Opinion is Modified and as Modified, the Petitions for Rehearing are DENIED. It is ordered that issuance of the Mandate is stayed to and including February 20, 1996 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:
Roy, J.
Ruland, J.
Rothenberg, J.

DATED: January 18, 1996

APPENDIX B

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SC88
CERTIORARI TO THE COLORADO COURT OF APPEALS,
94CA0652 & 94CA0661
DISTRICT COURT, CITY AND COUNTY OF DENVER,
93CV378

ORDER OF COURT

GLENN CHAMBERS AND
ROCKY MOUNTAIN CONFERENCE OF THE
UNITED METHODIST CHURCH,
A COLORADO NON-PROFIT CORPORATION,

Petitioners,

v.

DIANNE R. WINKLER,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 3, 1996.

cc: James J. Morrato
KELLER, WAHLBERG & MORRATO, P.C.
1050 - 17th Street, #1440
Denver, CO 80265

Neil Quigley
Bruce A. Logan
QUIGLEY & BRUCE
1010 Cherry Tower
950 S. Cherry Street
Denver, CO 80222

Joyce Seelen
HOLLAND, SEELEN & PAGLIUCA
1700 Lincoln, #2530
Denver, CO 80203

Honorable John N. McMullen
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

Clerk of the District Court
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

Patrick H. Stanford, Clerk
Colorado Court of Appeals

COLORADO COURT OF APPEALS **May 30, 1996**
No. 94CA1058
No. 94CA1183
No. 94CA1200

CHRISTA G. BOHRER,

Plaintiff-Appellee,

v.

DANIEL DEHART;
FIRST UNITED METHODIST CHURCH OF GREELEY,
A NON-PROFIT COLORADO CORPORATION;
AND ROCKY MOUNTAIN CONFERENCE
OF THE UNITED METHODIST CHURCH,
A NON-PROFIT COLORADO CORPORATION,

Defendants-Appellants.

Appeal from the District Court
of the City and County of Denver
Honorable Connie L. Peterson, Judge
No. 93CV434

Division IV **JUDGMENT AFFIRMED IN PART,**
Opinion by JUDGE BRIGGS **REVERSED IN PART,**
Sternberg, C.J., and **AND CAUSE REMANDED**
Marquez, J., concur **WITH DIRECTIONS**

Holland, Seelen & Pagliuca, Joyce Seelen, Brian K. Holland, Denver, Colorado, for Plaintiff-Appellee

Hibschweiler & Johnson, James D. Johnson, Sheila E. Barthel, Denver, Colorado, for Defendant-Appellant Daniel DeHart

Keller, Wahlberg & Morrato, P.C., James J. Morrato, Denver, Colorado, for Defendant-Appellant First United Methodist Church of Greeley

Quigley & Bruce, William C. Ritter, Neil Quigley, Denver, Colorado, for Defendant-Appellant Rocky Mountain Conference of the United Methodist Church

In this consolidated appeal, defendants Daniel DeHart (DeHart) and Rocky Mountain Conference of the United Methodist Church (Conference) appeal the judgment of the trial court finding them liable to plaintiff, Christa G. Bohrer, on claims arising out of DeHart's sexual abuse of plaintiff while she was a minor. Defendant First United Methodist Church of Greeley (Church), which is a member of the Conference, does not appeal the judgment awarded against it, but appeals the trial court's order imposing on defendants joint and several liability for plaintiff's costs. We affirm the judgment of liability against DeHart on the claims against him for breach of fiduciary duty and outrageous conduct, the judgment of liability against the Conference on the claim against it for negligent hiring and supervision, and the award of costs jointly and severally against all defendants. We reverse the judgment of liability on the claim against the Conference for breach of fiduciary duty, reverse the compensatory and punitive damage awards against DeHart and the Conference, and remand for a new trial to determine the allocation of fault among defendants and the amount of compensatory and punitive damages to be awarded against DeHart and the Conference.

When plaintiff was a twelve-year-old parishioner at the Church, DeHart, its youth minister, encouraged her to discuss with him any problems she had. Though reluctant at first, she eventually began counseling with him and confided in him about her abusive father, her distant mother, and her thoughts of suicide. DeHart, then twenty-eight years old and married, began to pursue a close relationship with the child involving more than counseling and support for her.

DeHart soon confided in plaintiff about his own personal problems, including his marital difficulties. Over the next two years, hugs during counseling sessions led to other increasingly intimate physical touching. Shortly after plaintiff turned fourteen, DeHart convinced plaintiff to submit to a sexual relationship with him. According to plaintiff, DeHart told her, among other things, that she was as bad as she believed when she came to him for counseling but that he loved her despite all of her faults; that their sexual relationship was God's will; and that the

relationship was proper in the eyes of God because they were spiritual husband and wife.

DeHart and plaintiff's sexual relationship lasted four years. Sexual encounters occurred, among other places, on Church youth trips, in DeHart's car, in the Church building, and in plaintiff's home when her parents were out of town. Plaintiff testified that DeHart told her that, if she ever revealed their relationship, she would "go to hell," that she would be punished for having seduced a minister, and that he would divulge everything she had ever told him about her personal life. Virtually all of the sexual conduct, which plaintiff's testimony indicated was frequent and became increasingly degrading for her, occurred before she turned eighteen.

Plaintiff finally managed to end the relationship the summer before she left for college. The emotional and physical repercussions she had been experiencing nevertheless continued.

After two years of therapy, plaintiff confronted DeHart, hoping he would acknowledge the harm he had caused her. He instead told her he saw nothing wrong with what they had done. She then called and wrote to Conference officials about the relationship, stating she felt she had a moral obligation to see that the same thing did not happen to others. She asked that the Conference keep the information as confidential as possible because she had not yet revealed the relationship to her parents or other members of the congregation.

The following month, Conference officials confronted DeHart with plaintiff's allegations. While he denied any sexual relationship, he agreed to surrender his credentials "under complaint." The Conference accepted the surrender and determined that no further investigation or hearings were warranted. Plaintiff also contacted local authorities, which led to criminal charges being filed against DeHart. The charges resulted in a conviction and sentence pursuant to a plea bargain that involved work release on one charge, probation on another, and no immediate restitution. Plaintiff testified that when she expressed her disappointment with the result, the male prosecutor, who had

replaced the initial female prosecutor, had explained it wasn't like DeHart had stolen anything from her, like a horse.

Dissatisfied with the actions taken, plaintiff sued DeHart, the Church, and the Conference. The jury awarded plaintiff $187,500 compensatory damages against DeHart on claims of breach of fiduciary duty and outrageous conduct and an equal amount in punitive damages. It awarded her $37,500 compensatory damages against the Church on a claim of negligent hiring and supervision. Finally, the jury awarded plaintiff $150,000 compensatory damages against the Conference on claims of negligent hiring and supervision and breach of fiduciary duty and an equal amount in punitive damages.

I.

DeHart contends that the trial court erred in denying his motions for summary judgment and directed verdict on plaintiff's claim of outrageous conduct and that, even if the claim were properly permitted, the trial court erred in its instructions regarding the claim. We find no error in the submission of the claim or the instructions concerning it.

A.

DeHart first asserts that the claim against him for outrageous conduct was based on conduct amounting to assault and battery. He argues that, because the statute of limitations on a claim for assault and battery had run, plaintiff's claim for outrageous conduct was barred or, if not barred, could not include consideration of conduct amounting to assault and battery. We do not agree.

The elements of a claim for outrageous conduct differ from those for a claim of assault and battery. The elements of assault are that: (1) the defendant acted either with the intent of making a contact with the person of the plaintiff or with the intent of putting the plaintiff in apprehension of such a contact; (2) the plaintiff was placed in apprehension of an imminent contact with his or her person by the conduct of the defendant; and (3) such

contact was or appeared to be harmful or offensive. *CJI-Civ. 3d* 20:1 (1989). The elements of battery are similar, except that the contact must have actually resulted. *See CJI-Civ. 3d 20:5* (1989).

In contrast, to succeed on a claim for outrageous conduct, a plaintiff must prove by a preponderance of the evidence that the defendant, by conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community, intentionally caused severe emotional distress. *See Rugg v. McCarty,* 173 Colo. 170, 476 P.2d 753 (1970).

Depending on the facts of the case, a claim for outrageous, conduct may overlap with a claim for assault and battery. The claims may coexist or either claim may exist without the other. Hence, in this case, even if the statute of limitations on an assault and battery claim had run, plaintiff still had the right to sue on the separate and still viable claim of outrageous conduct and to have the jury consider all of DeHart's conduct, including that constituting assault and battery. *See Winkler v. Rocky Mountain Conference of United Methodist Church,* P.2d (Colo. App. Nos. 94CA0652 & 94CA0661, November 9, 1995); *Enright v. Groves,* 39 Colo. App. 39, 560 P.2d 851 (1977).

B.

DeHart asserts that plaintiff portrayed his conduct as sexual battery throughout the course of voluminous discovery and in pre-trial motions. He argues that plaintiff was therefore precluded by the doctrine of judicial estoppel from pursuing and presenting to the jury claims for outrageous conduct and breach of fiduciary duty. We again disagree.

The doctrine of judicial estoppel applies only when there has been judicial acceptance of a contradictory position by a party in an earlier proceeding. *See Lyons Savings & Loan Ass'n v. Dire's Lock & Key Co.,* 885 P.2d 345 (Colo. App. 1994). DeHart has made no such assertion, and the record reveals no such judicial ruling.

II.

DeHart contends that for several reasons the trial court erred in submitting to the jury the claim against him for breach of fiduciary duty. We again disagree.

A.

DeHart asserts, in an argument similar to that presented regarding the outrageous conduct claim, that conduct amounting to assault and battery is not actionable by a claim for breach of fiduciary duty. We reject the contention for similar reasons. *See Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988); *Winkler v. Rocky Mountain Conference of United Methodist Church, supra; DeBose v. Bear Valley Church of Christ,* 890 P.2d 214 (Colo. App. 1994)(*cert. granted* June 19, 1995).

B.

DeHart next asserts that he could not breach any fiduciary duty to plaintiff because a fiduciary duty arises only when one exerts control over the financial affairs of another. However, in *Moses v. Diocese of Colorado,* 863 P.2d 310 (Colo. 1993), the supreme court held that the clergy-parishioner relationship may be fiduciary in nature; that one of the fiduciary's duties is to act with utmost good faith and solely or primarily for the benefit of the dependent party; and that the existence of such a relationship is a question of fact for the jury. The holding in *Moses* is dispositive of DeHart's assertion.

C.

DeHart finally asserts in regard to the claim of breach of fiduciary duty that the trial court erred in refusing to instruct the jury that only conduct occurring during the pastoral counseling relationship was actionable. He relies on the fact that in 1985 he resigned as a minister at the Church to pursue academic studies. We conclude that the trial court correctly refused the instruction.

DeHart's argument ignores that he continued to be involved in the youth programs at the Church after his resignation as a minister with the Church and that the jury could conclude from the evidence presented that DeHart never formally terminated the counseling relationship with plaintiff. More importantly, the argument improperly assumes that any duty an adult counselor has to avoid harming a child being counseled necessarily ends immediately when formal counseling ceases.

The supreme court in *Moses* recognized that a parishioner may develop a deep emotional dependence on his or her minister. The intensity of the emotions results in part from the process of "transference and is a typical reaction characterized by a patient unconsciously attributing repressed feelings to the counselor. Transference is one of the most significant concepts in therapy." *Moses v. Diocese of Colorado, supra,* at 328.

As one expert further explained in this case, that dependence leaves the parishioner vulnerable to manipulation because of the resulting "power imbalance." The person in the position of trust can maintain or increase the power imbalance within the distorted reality of the "closed setting" that has evolved and thus continue to take advantage of the parishioner's vulnerability beyond the formal counseling relationship.

DeHart's argument, in effect, is that his own continuing conduct after any formal counseling relationship ended was the legal equivalent of an intervening cause of at least part of plaintiff's damages. That argument cannot succeed when the continuing conduct results from a continuation of the power imbalance created in the fiduciary relationship, and the harm is reasonably foreseeable. *See generally* W. Prosser & R. Keeton, *Prosser and Keeton on Torts* §44 at 301, 303 (5th ed. 1984)("On its face, the problem is one of whether the defendant is to be held liable for an injury to which the defendant has in fact made a substantial contribution, when it is brought about by a later cause of independent origin, for which the defendant is not responsible. In its essence, however, it becomes again a question of the extent of the defendant's original obligation; and once more the problem is not primarily one of causation at all, since it does not arise

until cause in fact is established. It is rather one of the policy as to imposing legal responsibility .... In all of these cases there is an intervening cause combining with the defendant's conduct to produce the result, and in each case the defendant's negligence consists in failure to protect the plaintiff against that very risk.").

Here, DeHart took advantage of his position of trust to abuse plaintiff sexually and emotionally within a cloak of secrecy and, even though the formal counseling relationship may not have continued, he continued the sexual and other abuse of plaintiff without interruption for the rest of her childhood. At least in these circumstances, we find no error in the trial court's refusal to give the requested instruction. *See generally* §12-43-704(l)(q), C.R.S. (1991 Repl. Vol. 5B)(person practicing psychotherapy subject to discipline for engaging in sexual contact with a client during the therapeutic relationship and "for up to six months after the period in which such a relationship exists"); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* Standard 4.07 (1992)("(a) Psychologists do not engage in sexual intimacies with a former therapy patient or client for at least two years after cessation or termination of professional services. (b) Because sexual intimacies with a former therapy patient or client are so frequently harmful to the patient or client, and because such intimacies undermine public confidence in the psychology profession and thereby deter the public's use of needed services, psychologists do not engage in sexual intimacies with former therapy patients and clients even after a two-year interval except in the most unusual circumstances...."); E. Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions,* 19 Fla. St. U. L. Rev. 499 (1991).

III.

DeHart claims that the trial court's submission of the outrageous conduct and breach of fiduciary claims against him to the jury was violative of the Establishment Clause of the First Amendment. However, the supreme court held in *Moses v. Diocese of Colorado, supra,* and *Destefano v. Grabrian, supra,* that

claims such as these are actionable at least when, as here, the defendant does not claim the conduct was religiously motivated.

The Conference similarly contends that submission to the jury of the negligent hiring and supervision and breach of fiduciary duty claims against it was violative of the Establishment Clause. The holdings in *Moses v. Diocese of Colorado, supra,* and *Destefano v. Grabrian, supra,* are equally dispositive of this contention. *See Winkler v. Rocky Mountain Conference of Methodist Church, supra.*

IV.

DeHart and the Conference assert that the trial court erred when it refused to give an instruction on comparative fault or otherwise submit the defense of consent to the jury. We are not persuaded.

Defendants' assertion is premised on the assumption that a child is capable of giving the kind of consent the law should recognize to a sexual relationship with an adult religious counselor. However, a child is in no position to exercise independent judgment and evaluate on an equal basis the consequences of such a relationship. For a child induced to give such "consent," harm is not only still inflicted, it may be exacerbated. *See generally* E. Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions, supra,* at 507-08 (common manifestations of the harm suffered by clients exploited by their religious counselors include "diminished self esteem, increased feelings of personal ambivalence, increased sexual difficulties, anger at being exploited, a feeling of being used as a sex object . . . an inability to trust other therapists . . . anxiety and depression [that] sometimes lead to hospitalization and suicide attempts. . . . a spiritual crisis . . . reputations [that] are shredded . . . [loss of jobs] and sometimes their entire lives in the community. These are not the usual results of a romantic relationship between two 'consenting adults.'").

Defendants argue that the jury should have been able to consider as comparative fault plaintiff's consent at least in the

later years of the relationship as plaintiff matured. The argument is similar to the argument that the jury should not be allowed to award damages for conduct occurring after the counseling relationship formally ended. It ignores that dependence, transference, and the resulting vulnerability do not cease merely because a child physically matures while sexual abuse in secrecy by an adult in a position of trust continues unabated. *Cf. Cassidy v. Smith,* 817 P.2d 555 (Colo. App. 1991)(Dubofsky, J., dissenting). It also ignores that, regardless of plaintiff's physical maturation, virtually all the sexual conduct occurred before plaintiff reached the age of majority.

The General Assembly has determined that consent is not a defense to a criminal charge of sexual assault on a child less than eighteen years of age by one in a position of trust. *See* §§18-3-405.3 & 18-3-408.5, C.R.S. (1995 Cum. Supp.). Nor is it a defense to a criminal charge of sexual assault by a psychotherapist upon a patient. *See* §18-3-405.5, C.R.S. (1995 Cum. Supp.) We likewise decline to allow the defense, at least in the circumstances presented here. *Cf. Cassidy v. Smith, supra* (statute of limitations on claim of sexual abuse of a child does not begin to run until the child reaches the age of majority).

The trial court therefore did not err in refusing to instruct the jury on comparative fault or consent. *See* E. Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions, supra* (positing that, because of the power imbalance, consent should not be available as a defense in a civil cause of action for injuries caused by sexual contact with a religious counselor); *see also University of Denver v. Whitlock,* 744 P.2d 54 (Colo. 1987)(if no duty of care is owed, no liability can be imposed); *cf. Simmons v. United States,* 805 F.2d 1363 (9th Cir. 1986)(upholding finding that statute of limitations had not run because transference and dependence made it difficult for the plaintiff to believe that anything the therapist had done had caused her emotional damage, instead blaming herself); *Bever v. First National Bank,* 843 P.2d 53 (Colo. App. 1992). *But see Robinson v. Roberts,* 423 S.E.2d 17 (Ga. App. 1992).

V.

The Conference and DeHart contend that the trial court abused its discretion in denying their motion for continuance after they were unable to locate an expert witness. We do not agree.

In deciding whether to grant a motion for continuance, the trial court should consider the circumstances of the particular case, weighing the right of the party requesting the continuance to a fair hearing against the prejudice that may result from the delay. Its decision is discretionary and will not be set aside on appeal absent an abuse of that discretion. *Butler v. Farner,* 704 P.2d 853 (Colo. 1985).

Here, plaintiff had endorsed a psychiatrist as an expert in June of 1993. After retaining their own expert, defendants requested that plaintiff submit to an examination in November. However, in a letter dated December 1, 1993, defendants asked plaintiff to stipulate to an extension in the time for the examination and in the deadline of December 24 for them to disclose the expert's findings and conclusions.

When plaintiff refused because of concern for preserving the trial date, defendants rescheduled the examination for December 24, 1993. After the examination, defendants sent plaintiff a copy of the expert's report with a letter dated December 31, 1993. However, defendants did not endorse the expert until January 14, 1994, twenty-one days after the C.R.C.P. 16 deadline. Defendants attempted to communicate with the expert through a letter dated January 19 but received no response.

On February 11, 1994, over plaintiff's objection, the court permitted the expert's late endorsement but required that defendants make the expert available for a deposition. However, defendants had been out of contact with the expert since January 6, 1994, and were unable to produce the expert for a deposition that had been scheduled for February 24, 1994. On March 1, 1994, thirteen days before the trial date, defendants filed their motion for continuance, indicating that the expert had disconnected her telephone and abandoned her office.

In ruling on defendants' motion, the trial court recognized that there had been some diligence by defendants, but it had already tried imposing a sanction less severe than exclusion for late endorsement of the witness. The court noted that defendants had selected the expert and then had insisted on retaining the expert, resulting in the late endorsement. The court further noted that the expert's report did not seem to be based on reasonable probabilities or professional standards but rather was a narrative of the expert's personal views, raising a question as to what actual value the expert might be to defendants at trial. Against the possible impact on defendants, the court weighed plaintiff's interest in finally resolving the case and avoiding the emotional and financial costs that would result from a continuance.

The issue is not how we might have ruled on the motion. Rather, defendants must demonstrate that the trial court's ruling was manifestly arbitrary, unreasonable, or unfair. *See Hock v. New York Life Insurance Co.*, 876 P.2d 1242 (Colo. 1994).

The court properly weighed the prejudice to all parties before it denied the motion. Defendants had the information in the expert's report available for their cross-examinations at trial. They have not demonstrated any specific prejudice resulting from the court's ruling. In these circumstances, we cannot say the trial court abused its discretion in denying defendants' motion for a continuance. *See generally Butler v. Farner, supra.*

VI.

The Church contends that the trial court abused its discretion in awarding plaintiff's costs against the three defendants jointly and severally rather than apportioning those costs among defendants "on a fair and reasonable basis." We perceive no abuse of discretion.

Section 13-16-104, C.R.S. (1987 Repl. Vol. 6A) provides that a plaintiff recovering for a wrong immediately personal to him or her shall recover costs. While the imposition of costs in such circumstances is required by this statute, the apportionment

of costs among multiple defendants is not so prescribed. Thus, even though damages are apportioned pursuant to §13-21-111.5, C.R.S. (1987 Repl. Vol. 6A), the award of costs remains in the discretion of the trial court. *See Winkler v. Rocky Mountain Conference of United Methodist Church, supra; see also Poole v. Estate of Collins,* 728 P.2d 741 (Colo. App. 1986).

The trial court's imposition of joint and several liability for costs furthers the intent of §13-16-104 that plaintiff recover her costs. Furthermore, a rule requiring that costs be apportioned based on fault would ignore that a plaintiff does not necessarily incur costs in direct proportion to the fault ultimately allocated by the jury among multiple defendants.

We also note that the Church has failed to address whether it may seek to recover from the other defendants, through an action for contribution, any costs it pays to plaintiff in excess of its proportionate share. See §13-50.5-104, C.R.S. (1987 Repl. Vol. 6A); *National Farmers Union Property & Casualty Co. v. Frackleton,* 662 P.2d 1056 (Colo. 1983); *see also Graber v. Westaway,* 809 P-2d 1126 (Colo. App. 1991).

Finally, we note that had the other defendants not been sued by plaintiff, and the Church had then designated them as nonparties at fault pursuant to §13-21-111.5, the Church would have been liable for the entire amount of costs, regardless of the proportion of fault allocated by the jury to the designated nonparties. The Church has not demonstrated why such an award of costs should be permitted but not the award here.

For these reasons, we perceive no abuse of discretion in the trial court's ruling. *See Winkler v. Rocky Mountain Conference of United Methodist Church, supra.*

VII.

The Conference contends the trial court erred in denying its motion for a directed verdict on the claim against it for breach of fiduciary duty. Based on the evidence in the record, we agree.

A directed verdict may properly be granted when the evidence, viewed in the light most favorable to the plaintiff, is insufficient to support a verdict in his or her favor on that claim. The test on review is whether reasonable persons could draw different conclusions from the evidence presented. *See Moore v. Georgeson,* 679 P.2d 1099 (Colo. App. 1983).

Critical here is the distinction between a claim for clergy malpractice, which because of the constraints of the First Amendment the courts may not entertain, and a claim for breach of fiduciary duty, which may properly be brought to the extent that the alleged wrongdoing falls outside the beliefs and doctrine of the religion. *See Moses v. Diocese of Colorado, supra; Destefano v. Grabrian, supra.*

An unequal relationship does not automatically create a fiduciary duty. In order to be liable the superior party must assume a duty to act with utmost good faith and solely or primarily for the benefit of the dependent party. *Moses v. Diocese of Colorado, supra.*

In this case, plaintiff has directed us to no evidence, and we can find none, suggesting that the Conference ever assumed a duty to act solely or primarily in the best interests of plaintiff in its investigation and resolution of her complaint. Unlike the church officials in *Moses v. Diocese of Colorado, supra,* no bishop or other representative of the Conference ever asked plaintiff to refrain from discussing the matter with anyone or asked plaintiff to let the Conference alone supervise whatever needed to happen on her behalf. *See generally United Fire & Casualty Co. v. Nissan Motor Corp.,* 164 Colo. 42, 433 P.2d 769 (1967); *First National Bank v. Collins,* 44 Colo. App. 228, 616 P.2d 154 (1980)(no fiduciary duty could exist if neither the nature of relationship nor conduct would have induced the plaintiff to relax the care and vigilance that would and should have ordinarily been exercised in dealing with a stranger). Indeed, plaintiff had previously sought and obtained support and counseling from others, which continued during and after her contact with the Conference, and her contact with local authorities led to criminal charges against DeHart.

Plaintiff argues that the jury properly could have found that a representative of the Conference lied in telling her that once DeHart surrendered his credentials under protest nothing further remained to be done to effect the termination of his ministry and that no authority existed to conduct any further investigation. She asserts that she suffered substantial harm because the Conference, in violation of its own Book of Discipline, failed to take further action to investigate plaintiff's complaint and fulfill its responsibilities to her. As described by a bishop in his testimony, these included the processes of "restoration" and "reconciliation."

However, the alleged wrongdoing results from expectations created by the beliefs and doctrine of the religion. Resolution of the claim would require that the courts become embroiled in a religious dispute requiring the interpretation and weighing of that doctrine. The First Amendment requires that we abstain from doing so and thus precludes an award of damages on such a basis. *See Moses v. Diocese of Colorado, supra; Destefano v. Grabrian, supra; DeBose v. Bear Valley Church of Christ, supra; cf. Van Osdol v. Vogt,* 908 P.2d 1122 (Colo. 1996).

The trial court therefore erred in denying the Conference's motion for a directed verdict on the claim against it of breach of fiduciary duty.

VIII.

DeHart and the Conference contend that the trial court committed reversible error in submitting to the jury verdict forms which did not meaningfully separate damages resulting from DeHart's conduct from those resulting from the Conference's response to plaintiff's complaint. They contend the court further erred in not requiring the jury to allocate liability among defendants for the injuries caused by DeHart's conduct. We agree the verdict forms were deficient.

Here, the trial court submitted to the jury two special verdict forms for each defendant. One was to be used if the jury found for defendant. The other was for use upon a finding of

liability and provided blank spaces for an award to plaintiff against the particular defendant for past and future damages, as well as punitive damages. None of the forms required the jury to allocate liability based on fault for injuries resulting from DeHart's conduct or to separate those damages from any separate damages resulting from the response by the Conference to plaintiff's complaint.

In his challenge to the verdict forms at trial, DeHart argued that, as long as the consequences to plaintiff for breach of fiduciary duty, outrageous conduct, and negligent hiring and supervision were the same, the damages recoverable under those different legal theories were the same. Hence, he argued that the jury should make a single determination of the amount of damages, if any, caused by plaintiff's relationship with DeHart and then, pursuant to §13-21-111.5, C.R.S. (1987 Repl. Vol. 6A) the jury should allocate fault among the three defendants for the damages resulting from the relationship. He further argued that, because only the Conference should be held liable for damages caused by its response to plaintiff's complaint to it, the jury should separately determine those damages.

In rejecting DeHart's arguments, the trial court in this case did not have the benefit of the analysis of these issues set forth in *DeBose v. Bear Valley Church of Christ, supra.* A division of this court in *DeBose* concluded that when an employer's negligent hiring or supervision of an employee did not result in any additional harm to the plaintiff beyond that caused by the employee, awards of separate damages against the employer and employee can result in the duplication of damages. Even though the jury in *DeBose* had been instructed not to assess damages under one theory of recovery they had assessed under another, it had been provided no instructional guidance as to the manner in which it was to divide the total damages suffered by the minor among his various claims.

Because the verdict form in *DeBose* had not provided for the jury, on the one hand, to make one award of damages for any single, indivisible injury and to apportion those damages pursuant to §13-21-111.5(2), C.R.S. (1987 Repl. Vol. 6A) based on

fault, and, on the other hand, to make a separate award of damages for any separate injury only against the defendants responsible for those damages, the court there concluded that the awards for compensatory damages had to be set aside. And, because the compensatory damages had to be set aside, the judgment for exemplary damages also had to be reversed. The court concluded: "Upon retrial, any verdict assessing the minor's actual damages should be limited to a single amount, apportioned under §13-21-111.5(2), unless the evidence would allow a determination that the minor suffered a separate injury from the actions of each of the . . . defendants." *DeBose v. Bear Valley Church of Christ, supra,* 890 P.2d at 224.

Here, we cannot assume that the amounts awarded by the jury against the separate defendants are for separate injuries or that they are the equivalent of an apportionment based on fault. The jury was not instructed to divide damages based on fault for a single, indivisible injury. Further, the verdict form for the Conference provided for a single award against it on the claims for negligent hiring and supervision and breach of fiduciary duty. We therefore cannot determine to what extent, if any, the award against the Conference is for any separate injury caused by its own conduct after plaintiff submitted to it her complaint against DeHart, as distinct from the injury caused by DeHart's conduct for which, to the extent the injury is the same, the Conference and the Church share liability because of their negligent hiring and supervision.

We agree with the analysis set forth in *DeBose.* It is therefore necessary to reverse the compensatory and punitive damage awards against both DeHart and the Conference.

However, we find no reason to reverse the judgments of liability against DeHart for breach of fiduciary duty and outrageous conduct and against the Conference for negligent hiring and supervision. Rather, only the damage awards against them must be reversed.

A separate problem then arises. Here, unlike in *DeBose,* there are three defendants, only two of which have appealed the judgments entered against them. No party has appealed the

judgment entered against the Church for $37,500 in compensatory damages. Hence, while the jury on retrial must include the Church in any allocation of fault so that on remand the damage award against the other two defendants may be properly calculated, the Church cannot be liable for any amount other than the judgment already entered. It should therefore be treated on retrial as a designated nonparty at fault pursuant to §13-21-111.5(3)(a), C.R.S. (1987 Repl. Vol. 6A).

The judgment of liability against DeHart on the claims for breach of fiduciary duty and outrageous conduct, the judgment of liability against the Conference on the claim for negligent hiring and supervision, and the award of costs jointly and severally against all defendants are affirmed. The judgment of liability on the claim against the Conference for breach of fiduciary duty is reversed. The compensatory and punitive damage awards against DeHart and the Conference are also reversed, and the cause is remanded for a new trial to allocate fault among defendants and determine compensatory and punitive damages to be awarded against DeHart and the Conference, consistent with the views expressed in this opinion.

CHIEF JUDGE STERNBERG and JUDGE MARQUEZ concur.

COLORADO COURT OF APPEALS **May 30, 1996**
No. 94CA1058
No. 94CA1183
No. 94CA1200

CHRISTA G. BOHRER,
Plaintiff-Appellee,
v.
DANIEL DEHART;
FIRST UNITED METHODIST CHURCH OF GREELEY,
A NON-PROFIT COLORADO CORPORATION;
AND ROCKY MOUNTAIN CONFERENCE
OF THE UNITED METHODIST CHURCH,
A NON-PROFIT COLORADO CORPORATION,
Defendants-Appellants.

Appeal from the District Court
of the City and County of Denver
Honorable Connie L. Peterson, Judge
No. 93CV434

Division IV **JUDGMENT AFFIRMED IN PART,**
Opinion by JUDGE BRIGGS **REVERSED IN PART,**
Sternberg, C.J., and **AND CAUSE REMANDED**
Marquez, J., concur **WITH DIRECTIONS**

Opinion Modified, and As Modified,
Petitions for Rehearing DENIED

Holland, Seelen & Pagliuca, Joyce Seelen, Brian K. Holland, Denver, Colorado, for Plaintiff-Appellee

Hibschweiler & Johnson, James D. Johnson, Sheila E. Barthel, Denver, Colorado, for Defendant-Appellant Daniel DeHart

Keller, Wahlberg & Morrato, P.C., James J. Morrato, Denver, Colorado, for Defendant-Appellant First United Methodist Church of Greeley

Quigley & Bruce, William C. Ritter, Neil Quigley, Denver, Colorado, for Defendant-Appellant Rocky Mountain Conference of the United Methodist Church

OPINION is modified as follows:

Beginning on page 1, 10 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by redlining) are made:

> plaintiff's costs. ~~We~~ affirm the judgment against DeHart determining him to be liable to plaintiff for breach of fiduciary duty, outrageous conduct, and punitive damages; the judgment against the Conference determining it to be liable to plaintiff for negligent hiring and supervision; and the award of costs jointly and severally against all defendants. We reverse the judgment against the Conference determining it to be liable to plaintiff for breach of fiduciary duty and for punitive damages, the compensatory damage awards against DeHart and the Conference, and the punitive damage award against DeHart. Finally, we remand the cause for a new trial to determine the allocation of fault among defendants; the amount of compensatory damages to be awarded against DeHart and the Conference; the amount of punitive damages to be awarded against DeHart; and whether to award punitive damages against the Conference and, if so, the amount of that award.

On pages 2 and 3, no changes, text moved to accommodate modifications.

On page 4, 5 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by redlining) are made:

> against the Church on claims of negligent hiring and supervision and breach of fiduciary duty. Finally, the jury . . .

On page 22, 3 lines from the bottom of the page and continuing to the end of the opinion on page 25, the following deletions

(shown by overstriking) and additions (shown by redlining) are made:

> However, we find no reason to reverse the judgments of liability for compensatory and punitive damages against DeHart for breach of fiduciary duty and outrageous conduct and for compensatory damages against the Conference for negligent hiring and supervision. Rather, only the damage awards against them must be reversed, with the jury on retrial to determine the amount of compensatory damages sustained for any single, indivisible injury, to apportion fault among defendants for that injury, and to determine the amount of punitive damages to be awarded against DeHart. *See Murrow v. Whiteley,* 125 Colo. 392, 404, 244 P.2d 657, 663 (1952) (authorizing partial new trial on damages only under test first articulated by the United States Supreme Court. "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."); *see generally* C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* §2814 (2d ed. 1995); *cf. Bassett v. O'Dell,* 178 Colo. 425, 49B P.2d 1134 (1972).

The judgment of liability for punitive damages against the Conference cannot be similarly sustained. The verdict form for the Conference does not indicate whether the award of punitive damages against it was based on conduct associated with the claim for negligent hiring and supervision, the claim for breach of fiduciary duty, or both claims. Because we have reversed the judgment against the Conference for breach of fiduciary duty, it is necessary to reverse the judgment of liability against it for punitive damages, with the jury on retrial to determine whether plaintiff is entitled to punitive damages against the Conference

based solely on its conduct associated with the claim for negligent hiring and supervision end, if so, the amount of punitive damages to be awarded.

* * *

The judgment of liability against DeHart on the claims for breach of fiduciary duty, outrageous conduct, and punitive damages, the judgment of liability against the Conference on the claim for negligent hiring and supervision, and the award of costs jointly and severally against all defendants are affirmed. The judgment of liability on the claims against the Conference for breach of fiduciary duty and for punitive damages are reversed. The compensatory and punitive damage awards against DeHart and the Conference are also reversed. The cause is remanded for a new trial to allocate fault among defendants, to determine compensatory damages to be awarded against DeHart and the Conference, to determine punitive damages to be awarded against DeHart, and to determine whether and, if so, in what amount, punitive damages should be awarded against the Conference, consistent with the views expressed in this opinion.